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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SEAN REYNOLDS, Defendant and Appellant.	A148131 (Alameda County Super. Ct. No. H58263)

Appellant Sean Reynolds appeals from a final judgment following a jury verdict convicting him of two felony counts of driving a vehicle under the influence of an alcoholic beverage and with a blood alcohol level of 0.08 percent or more. (Veh. Code, § 23152, subds. (a) & (b).)[1] Both offenses occurred within 10 years of three prior convictions of driving under the influence of alcohol (DUI) and were therefore charged as felonies. (§ 23550.)

Appellant's court-appointed counsel has filed a brief raising no legal issues and requesting this court conduct an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Having reviewed the record, we shall conclude that no arguable issue is presented that requires briefing.

FACTS AND PROCEEDINGS BELOW

While on patrol in the City of Fremont, on September 11, 2014, Officer Joshua Harvey was in a left-turn pocket on Grimmer Boulevard waiting for a green light so he

[1] All statutory references are to the Vehicle Code unless otherwise indicated.

could turn left into eastbound Valpey Park Avenue and saw a truck rolling up to the intersection on Valpey at a normal rate of speed. When appellant, who was the driver of the truck, saw Officer Harvey, he turned right on Grimmer and drove away from the intersection at a high rate of speed. Officer Harvey thought the truck might have been involved in the accident in the area he had been dispatched to investigate, and therefore made a U-turn to follow the truck.[2] While a few hundred yards behind the truck, Harvey saw it drive through a red light at Grimmer and Blacow. Though he was travelling at 80 miles an hour, Harvey was unable to catch up with the truck, but he broadcast what was happening to other officers in the area.

Officer Elise Dooley and Officer Candler, who were nearby in separate vehicles, heard Harvey's message and volunteered to assist in locating the truck. While driving south on Grimmer, Dooley saw the truck rapidly approaching from the opposite direction at about 60 miles per hour. After the truck passed her and Officer Candler, they both made U-turns and pursued the vehicle. After Officer Candler pulled behind the truck and activated the overhead lights on his patrol car, it pulled to the side of the road. Dooley asked appellant to exit the vehicle and produce his driver's license and vehicle registration. Appellant smelled of alcohol, his speech was rapid, slurred, and erratic, and he answered questions that had not been asked. Appellant repeatedly stated "I was not driving earlier," and "I am not the person you are looking for." Officer Candler asked appellant to sit on the curb, as he was unsteady on his feet.

When Officer Harvey arrived at the scene he recognized the truck as the one he had seen earlier, and asked appellant questions about his driving. Appellant was agitated and spoke rapidly, and Harvey smelled the odor of alcohol on his breath. Appellant ignored the questions whether he had been drinking, reiterating that he was not the person the officers were looking for. Because Harvey had by then worked a full overnight shift, Officer Dooley took over as the primary arresting officer. After she informed appellant

[2] Officer Harvey apparently made the U-turn after turning into Valpey and then turned left onto Grimmer to follow appellant.

of the implied consent law, which provided that appellant's license could be suspended if he refused to submit to a chemical or breath test of his blood alcohol level, even if it was under 0.08 percent, appellant kept repeating "I'm not the person you're looking for" and refused to elect a chemical breath or blood test.

When Sergeant Ricardo Cortez arrived at the scene he attempted to subject appellant to a preliminary alcohol screening (PAS), or PAS test, which requires the subject to blow into a handheld device. He was unable to obtain an accurate reading because appellant did not make "a genuine effort" to blow into the device, as Cortez requested.

Due to appellant's unwillingness to participate in the administration of a PAS test, Officer Dooley sought a warrant to take a blood draw from appellant. After the warrant request was approved over the phone by an on-call judge, appellant was handcuffed and taken to Washington Hospital, where a phlebotomist made a blood draw.

The two blood samples taken were analyzed by Alan Barbour, a qualified "forensic alcohol supervisor," who testified that the samples both showed a blood alcohol level of 0.163.

The parties stipulated that at the time the blood samples were taken from him appellant was on probation with a condition requiring him to submit to a chemical, blood, or breath test upon the demand of a law enforcement officer.

Appellant, who presented no evidence at trial, was convicted by the jury of both counts. The day after the jury returned its verdict, the trial court conducted a trial of the validity of the alleged prior DUI convictions. The bench trial consisted of the receipt in evidence of seven documents—People's exhibits 17, 18, and 20 through 24—documenting appellant's criminal record and showing, among other things, that he was convicted on August 17, 2011, of two separate prior convictions of DUI in Orange County and a third conviction of that offense on January 5, 2010, in Los Angeles County.

According to the probation report, appellant "received numerous grants of court probation, primarily from Orange County," and when the present offense was committed he was on formal probation for an offense committed in Orange County in 2012.

Probation was transferred to Alameda County in 2014. The present offenses are appellant's second and third felony convictions,[3] in addition to 17 misdemeanor convictions.

As recommended by the probation department, appellant was sentenced to one year in the Alameda County jail with credit for 166 days of time served with standard alcohol and driving conditions, fines and fees. He was required to surrender his driving license, spend three months in in-patient treatment following release, and attend a program administered by Mothers Against Drunk Driving.

DISCUSSION

Appellant's *Wende* brief identifies seven issues he believes our independent review should consider: namely, whether the trial court erred by (1) denying appellant's motion to quash the search warrant and suppress the results of the blood test executed pursuant to the warrant; (2) failing to obtain a personal waiver from appellant of his right to a jury trial regarding the alleged prior convictions; (3) failing to sua sponte suspend the proceedings pursuant to Penal Code section 1368 to determine appellant's competence to stand trial; (4) denying appellant's request to cross-examine Officer Dooley and obtain discovery regarding her arrest in Glenn County for driving a vehicle under the influence of alcohol; (5) allowing police officers to testify, over objection, that appellant did not make a genuine effort to blow into the device used to administer the PAS test; (6) failing to sustain an objection to the admission of evidence appellant was on misdemeanor probation, which required him to submit to forensic testing (and whether the PAS test was a valid forensic test); and (7) receiving in evidence appellant's statements to the arresting officer over his *Miranda*[4] objection.

After reviewing the entire record, we conclude that none of these arguments are arguably tenable and therefore no further briefing is required.

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[3] On February 29, 2012, appellant was convicted in Orange County of vandalism in violation of Penal Code section 594, subdivisions (a) and (b), as a felony, and sentenced to three years probation and 108 days in jail.

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

I.

It is Not Arguable that the Court Erred in Denying Appellant's Motion to Quash the Warrant and Suppress the Evidence Disclosed by the Search

The public defender moved to quash the warrant and suppress the evidence on the ground that the two-paragraph affidavit submitted by Officer Harvey "failed to establish probable cause that [appellant's] blood would contain evidence of a crime."

Officer Harvey's affidavit stated that, while responding to a report of collision on Valpey Park Avenue, he saw a truck approach his patrol car and then turn right and accelerate. Following the truck, which was then traveling at 80 miles per hour, he saw it run a red light and then "broadcasted a description of the vehicle and the direction it was travelling." Officer Candler initiated a traffic stop on Paseo Padre Parkway, just north of Grimmer Boulevard. In the second paragraph of the affidavit Officer Harvey states he could smell the odor of an alcoholic beverage on appellant's breath. Also, appellant "refused to answer questions about alcohol consumption. He talked in circles about an accident he witnessed earlier in the evening," "attempted to provide a sample during [the PAS] test," and "continued to refuse to answer our questions regarding his alcohol consumption. [Officer] Dooley placed [appellant] under arrest for VC 23152. When given the option of providing a blood or breath sample, [appellant] would not answer."

At the hearing on the motion to suppress, the public defender argued that the "bare facts" set forth in the affidavit do not amount to the type of probable cause that would "allow an intrusion into someone's body, such as is required for a blood draw" and that "[t]here's no mention of any FSTs [field sobriety tests], there's no mention of any other signs and symptoms of intoxication." The district attorney, who expressed her understandable "surprise" at this claim, pointed to Harvey's statement that he smelled the odor of alcohol on appellant's breath, appellant refused to say whether he had been drinking alcohol and failed to provide a usable breath sample during the PAS test, and continued to refuse to answer questions about his consumption of alcohol, all of which "are signs and symptoms of somebody under the influence of alcohol," and "rise to the level of probable cause" that appellant was driving while under the influence of alcohol

in violation of section 23152. The trial court agreed and so do we. The possibility the warrant was not supported by probable cause is not arguable.

II.

The Trial Court Erred in Accepting Appellant's Waiver of his Right to a Jury Trial on the Alleged Prior Convictions but the Error was Unarguably Harmless

As noted earlier, the complaint alleged that appellant suffered three prior convictions of violation of section 23152, subdivision (b); one on January 5, 2010 and two on August 17, 2011. During trial on the charged offenses, the public defender observed during the discussion of in limine motions that "I am willing to waive jury for the trial on the priors if that becomes necessary." As appellant did not stipulate to the truth of the alleged prior convictions, a trial became necessary. However, so far as the record shows, appellant never waived a jury, and the deputy public defender never again indicated she was or appellant was still willing to do so.

The bifurcated trial on the priors was discussed by the court and counsel immediately after the court thanked and excused the jury. After the court told counsel "we should probably proceed tomorrow with doing that [i.e. conducting the bifurcated trial on the priors]. And we'll bring the defendant back at that time. And *that's going to be by stipulation a court trial, as I understand it*." (Italics added.) When the court inquired whether counsel would be prepared to go forward with that, the deputy district attorney answered "yes," but defense counsel remained silent.

At the commencement of the bifurcated trial the next day, which was March 2, 2016, the public defender announced that appellant was present in custody in the courthouse, but waived his appearance in the proceeding. The court responded that appellant's "appearance will be waived in that regard and accepting counsel's representation that he indicated he does not wish to appear in this proceeding."

The minute order memorializing what transpired on March 2, the day of the bifurcated trial, states, as material, that the matter had been "placed on the calendar for *jury trial*, having been continued from March 1. [¶] Court and counsel are present in open court for *court trial* on priors. Defendant's appearance is waived. [¶] People's

Exhibits . . . are admitted into evidence. The court finds [first, second, and third] priors to be true. [¶] The defendant enters the courtroom." (Italics added.)

The trial on the priors appears to have consumed about five or ten minutes. No testimony was presented and the proceeding consisted solely of the offering into evidence by the prosecution of seven documents setting forth appellant's prior criminal history, and a determination by the court, based on that evidence, the three alleged DUI priors were "true." Defense counsel objected to the receipt in evidence of each and every exhibit offered by the prosecution on the grounds that the documents were all "based on hearsay and lacked foundation."[5]

As we have said, although the deputy public defender stated during the trial on the charged offenses that "I have informed [the deputy district attorney] that I am willing to waive [jury for the] trial on the priors if that becomes necessary," and though after the jury returned its verdict the court stated its understanding that the trial on the priors is "going to be by stipulation a court trial," the record contains no such waiver or stipulation.

The failure of the court to obtain appellant's personal waiver of his right to a jury trial on the alleged prior DUI convictions was error; but, as explained in *People v. Epps* (2001) 25 Cal.4th 19 (*Epps*), the error was harmless.

In *Epps*, the defendant was charged with several felonies together with allegations that he had suffered prior convictions. The trial court bifurcated the trial of the alleged priors from the trial of the substantive offenses. The jury found him guilty of the charged offenses and the court then dismissed the jury and, despite the defendant's objection, held a bench trial on the priors alleged, finding all of them true. The Court of Appeal

[5] Although appellant was not present at the bifurcated trial, at the close of the brief proceeding, as the court was about to set a date for a sentencing hearing, the public defender asked "could we actually bring [appellant] out just for the setting of that date. He was concerned with that." Appellant was present in the courtroom after the court found the alleged priors true, when the court set a date for the sentencing hearing.

reversed, but the Supreme Court reversed that ruling after concluding that the erroneous denial of the defendant's limited right to a jury trial of the prior conviction allegations[6] was subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836. Applying the *Watson* test, the *Epps* court concluded that it is not " 'reasonably probable that a result more favorable [to defendant] would have been reached' [citation] if the jury, instead of the court, had determined that defendant 'suffered' [citation] the prior convictions." (*Epps*, *supra*, 25 Cal.4th at p. 29.) As in *Epps*, the only factual question at the bifurcated trial on the prior convictions was whether they occurred, and appellant never claimed they did not. Moreover, also as in *Epps*, the prior convictions alleged in this case "were official government documents clearly describing the alleged convictions. As such, the fact of the convictions was presumptively established. (Evid. Code, § 664.) Under those circumstances, the trial court's error could not possibly have affected the result." (*Id.* at pp. 29-30.)

The fact that the trial court accepted appellant's waiver of the right to appear at the trial on the priors when the waiver was not made by appellant personally or in writing may also have been erroneous, but if so it was also harmless error. First of all, before she

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[6] As *Epps* explains, the 1997 amendment to Penal Code section 1025 was originally intended to unambiguously eliminate the right to a jury trial of prior conviction allegations, because the only issue at such a trial is identity—whether the present defendant is the same person described in the record of the prior conviction. But to obviate the concerns of the bill's detractors, who felt identity was not the only issue, the measure was amended so that it eliminated the right to a jury trial only with respect to the issue of identity. (*Epps, supra*, 25 Cal.4th at p. 24.)

CALCRIM No. 2126, the instruction specified by the Judicial Council to be given after a defendant has been convicted of DUI and a bifurcated trial is to be held before a jury, tells jurors that "[i]t has already been determined that the defendant is the person named in exhibits [containing documents showing the defendant was convicted of the alleged priors]" but that nevertheless the jury "must decide whether the evidence proves that the defendant was convicted of the alleged crime[s]." The unlikelihood a jury told that it must consider the defendant to be the person named in the exhibits will not conclude that the defendant committed the offenses to which the exhibits refer is undoubtedly why defendants in DUI cases almost never ask for a jury trial on alleged priors.

waived appellant's personal appearance at the trial on the priors, defense counsel told the court appellant was in custody. The court accepted the waiver immediately before commencing that trial, which, as noted, lasted about 10 minutes. Appellant appeared in the courtroom immediately after the bench trial ended because defense counsel told him that was when the court would set a date for the sentencing hearing and appellant wanted to be heard on the setting of that date. In other words, it appears appellant was in custody in or close by the courthouse at the time counsel waived his appearance, so appellant's concurrence in his counsel's vicarious waiver was affirmed by his conduct. That is, he could easily have appeared but declined to do so.

Additionally, the right to a jury trial on a prior conviction that has been alleged as a sentence enhancement arises under a statute (Pen Code, § 1025), and is not protected by the state or federal Constitution. (*People v. Vera* (1997) 15 Cal.4th 269, 277.) So far as we know, no court has ever held that the right of a criminal defendant to waive an appearance at a proceeding that is not constitutionally mandated, not usually sought, and not likely to present a close factual question, is nevertheless so momentous that it cannot be waived by counsel on behalf of the defendant.

III.

It is not Arguable that the Court Erred in Failing to Consider Whether Appellant Was Competent to Stand Trial

Due process requires a trial court to conduct a competency hearing pursuant to section 1367 when there is substantial evidence that the defendant is incompetent—i.e., that he or she lacks the ability to consult with counsel with a reasonable degree of rational understanding and a rational, as well as a factual understanding of the proceeding against him or her. (*Godinez v. Moran* (1993) 509 U.S. 389, 394; Pen. Code, § 1367.)

The record contains two factors that might conceivably raise doubt about appellant's competency.

The first is a statement in the probation report that "according to a phone conversation with his mother, the defendant was diagnosed as highly functioning bipolar and schizophrenic. He does not take his medication and needs help with his mental

health." However, the report also notes that appellant stated to a probation officer that "he was seen by a psychologist while in Santa Rita Jail, but denied being diagnosed with any mental health problems."

The other factor in the record bearing upon the possibility appellant was incompetent are his repeated outbursts during trial. For example, during the testimony of Dr. Alan Barbour, a forensic alcohol supervisor who testified for the prosecution, appellant interrupted the proceedings by inquiring "when are we going to end this today? Are we going to go long enough to hear everything that [the district attorney] has to present?" When the judge dismissed the jury and attempted to describe "the situation" to appellant he cut the judge off, stating "I'm speaking with my counsel," not the court, and "I'm not going to be lectured—I have questions to ask." Later, while still out of the presence of the jury, after defense counsel moved to dismiss the case based on the inadequacy of Dr. Barbour's testimony regarding the blood draw and analysis, and the trial court denied the motion as premature, appellant told the court: "You're unjust. You're lying. I'm oppressed." Rejecting the court's attempt to explain the situation to him, appellant blurted: "Freedom of speech. The First Amendment says you cannot make a law of—on religion. Freedom of—I'm a peaceful person. I'm not being threatening or anything—I'm telling you the truth." When the court responded: "That's fine. And I'm denying your motion at this time" appellant declared: "That's prejudice—you are breaking the law denying me my rights."

Before reconvening the jury the next day, the court invited counsel to state their position on defense counsel's proposed instruction relating to jury consideration of the fact appellant was on probation at the time he was detained. The district attorney asked whether she could "look at this when we're done with evidence this morning," at which appellant repeatedly interjected: "There is no evidence." The court and counsel ignored these statements. A few moments later the district attorney suggested that before the jury came in, the court should put on the record "its ruling about the *Miranda* issue." (As we later discuss, the court found no *Miranda* warning called for in connection with the police admonitions given appellant prior to the blood draw, with certain caveats.) At that point,

appellant ignored the court's attempts to placate him and stated: "there was no *Miranda* rights read," "this is oppression," "[e]vidence says that they didn't read me my *Miranda* rights," "This come[s] from the Capitol, Deputy Mayor Sacherstein," "they cannot present evidence without *Miranda* rights," "I'm presenting a strong argument," "I'm not guilty," and "I one thousand percent did not drink and drive."

About 15 minutes later, during the preliminary direct examination of Officer Harvey, the district attorney asked Harvey whether he was on duty at 3:20 in the morning on September 11, 2014. After he said: "Yes" appellant interjected: "Wrong." Later, when Harvey described the towing of appellant's truck and the "inventory" made of its contents, appellant observed: "You did an illegal search" and the court instructed the jury to ignore the statement After appellant repeatedly stated "liar" during the testimony of several witnesses and during statements by the deputy district attorney, and made other improper interjections, the prosecutor stated that "I just do want to make sure that the record reflects that the defendant has been having outbursts in the middle of testimony . . . and directing comments to the witnesses." The court stated that it understood this concern and noted that appellant's comments "were on the record actually." Outside the presence of the jury, the court instructed appellant not to make any further outbursts while a witness was testifying. Appellant said "Okay" and told the court "I'm done infringing my freedom of speech, sir." When the court responded: "All right. I understand, sir" appellant, somewhat sarcastically, stated "sustained," prompting the court to sternly warn appellant that "I don't want any further outbursts from you" and that "at some point, if it becomes a problem, I'm going to exclude you from the courtroom and we'll have to do you by video or something. I don't want to do that."

On several occasions the court also admonished the jury that appellant was never placed under oath and his statements should not be considered evidence.

After the close of testimony on February 29, 2016, the day before the court instructed the jury and it began its deliberations, the court excused the jury, telling jurors "we'll see you tomorrow morning at nine o'clock sharp for the closure of this matter." Appellant thereupon told the jury: "Thank you for your time and doing your civil duty."

The next and last comment appellant improperly made was after the jury returned its guilty verdict, and had been finally admonished and thanked by the court for its service and excused. At that point, appellant observed: "Fucking scumbags. You disgust me."

We do not think the information about appellant's mental state provided the probation department by appellant's mother, and appellant's outbursts during trial, provide sufficient evidence of incompetency to require the court, sua sponte, to conduct a hearing on that issue pursuant to Penal Code section 1368.

The information in the probation report was not received by the court until after completion of the jury trial of the charged offenses and the bench trial on the prior convictions. As noted in *People v. Jones* (1991) 53 Cal.3d 1115, the judicial duty to conduct a competency hearing arises at any time substantial evidence is presented creating a reasonable doubt about the defendant's competence to stand trial, provided that the evidence is produced " 'prior to judgment.' " (*Id.* at p. 1152, citing Pen. Code, § 1368) Furthermore, this information did not indicate appellant lacked "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." (*Dusky v. United States* (1960) 362 U.S. 402 (per curiam).)

Nor were appellant's intemperate outbursts at trial indicative of such deficiencies. As noted by our Supreme Court in *People v. Marshall* (1997) 15 Cal.4th 1, 33, "[m]ore is required than just bizarre actions or statements by the defendant to raise a doubt of competency. [Citations.] In addition, a reviewing court generally gives great deference to a trial court's decision whether to hold a competency hearing. As we have said: ' "An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper." ' [Citations.]"

Finally, while wholly inappropriate, somewhat bizarre, and undoubtedly counterproductive, virtually all of appellant's statements show he was paying close attention to the testimony of the witnesses, the comments of counsel, the rulings of the court, and the verdict of the jury, and that he possessed a rational, as well as a factual

understanding of the proceedings against him. Primarily for that reason we do not consider it arguable that the trial court erred in declining to conduct a section 1368 competency hearing.

IV.

The Court's Denial of Appellant's Right to Cross-Examine Officer Dooley About Her Arrest for DUI and Discovery of the Arrest Report Was Not Arguably Erroneous

About a year after appellant was arrested, Officer Dooley was arrested for DUI in Glenn County but had not been convicted of that or any other offense at the time of appellant's trial. In response to appellant's *Brady*[7] motion for discovery of the police report and any other materials relevant to her arrest, the trial court reviewed the police report of the arrest in camera. Denying the *Brady* motion on the basis of its in camera review of the investigative report of Officer Dooley's conduct and arrest, the court stated that it "did not see anything that I would consider to be *Brady* material." The court denied the motion also on the grounds that Officer Dooley had not been convicted and, in any event, "DUI is not a crime of moral turpitude" and therefore cannot be used to impeach her credibility. (*In re Carr* (1988) 46 Cal.3d 1089.)

Defense counsel also claimed a right to discovery of the investigative reports prepared by the California Highway Patrol regarding Dooley's arrest and a right to cross-examine Dooley in order to determine whether she might be "in trouble at work because of this DUI" and therefore motivated to embellish her testimony regarding appellant's conduct, or omit her failure to comply with policies of the Fremont Police Department, which would ease her employer's concern about her DUI arrest. As defense counsel stated, "I certainly won't be getting into the facts of [Officer Dooley's] DUI, but I think the fact that her boss told her not to work until further notice is relevant to her motivation to testify in compliance with the Fremont Police Department policies in this case instead

[7] *Brady v. Maryland* (1963) 373 U.S. 83.

of admitting any potential mistakes or misconduct during the course of this DUI investigation [of appellant]."[8]

The trial court reviewed the police report of appellant's arrest, which it subsequently ordered sealed, and found that it did not contain *Brady* material or indicate Officer Dooley could be charged with felony DUI. We too have reviewed the police report and reach the same conclusions.

The deputy district attorney represented to the court that she had obtained and reviewed Officer Dooley's rap sheet and it did not show she had been charged or arrested for any prior offenses, and the DUI for which she was recently arrested therefore could not be charged as a felony and used to impeach her credibility. In the end, the court ruled that the evidence that Officer Dooley was on administrative leave from her job as a police officer at the time she testified could be introduced by counsel, "but the underlying reasons for it"—i.e., her arrest for DUI—would not be allowed. The court left open the possibility Officer Dooley's arrest might be received in evidence if the prosecution opened the door to the issue, as by telling the jury that Officer Dooley had no reason to give false testimony. This ruling is clearly not arguably erroneous.

Relying on *People v. Forster* (1994) 29 Cal.App.4th 1746, defense counsel also questioned the court's statement that DUI was not a crime of moral turpitude, and sought leave to offer the arrest into evidence on that ground. As the trial court recognized, *Forster* was a case in which the defendant, who was convicted of driving while having a blood-alcohol concentration of 0.08 percent or more in violation of section 23152, subdivision (b) and driving with a suspended license, admitted allegations that within

[8] The district attorney vigorously contested this argument. Pointing out that, because Dooley was put on administrative leave more than a year after appellant's arrest, "the department's reasons for her being on administrative leave have absolutely nothing to do with this case, nothing to do with her performance back in September of 2014. And . . . to allow the jury to speculate about what the reasons for that may be when the facts of the administrative leave have absolutely nothing to do with what she's doing here in court, other than to impugn her character and to make her look bad."

seven years of the commission of the charged offenses[9] he had suffered three prior convictions of DUI within the meaning of section 23175, thus elevating his new offenses to felonies, which were crimes of moral turpitude that, unlike misdemeanor DUIs, could be used to impeach credibility. The key issue in *Forster* was whether a DUI committed within a specified period of three or more DUI priors is a crime of moral turpitude within the meaning of *Castro*.[10] The *Forster* court concluded that it is.

In the present case, the trial court evidently denied appellant's *Brady* motion primarily because Officer Dooley had not been charged or convicted of the offense for which she was arrested, and nothing in the reviewed materials suggested she would even be charged, let alone convicted, of felony DUI. The denial of appellant's *Brady* motion was unarguably correct.

V.

The Trial Court Did Not Err in Allowing Officers to Testify that Appellant Failed to Make a "Genuine Effort" to Blow Into the Device Used to Administer the PAS Test

As earlier described, Officer Ricardo Cortez, who administered the PAS test to appellant, testified that he instructed him to "put your lips around [the tube on the device] and blow like a balloon." When appellant made a feeble effort Cortez encouraged him to keep going and "blow, blow, blow," harder into the device but, though appellant made "some kind of attempt," he was unable to obtain a reading. Asked by the deputy district attorney what he did after that, Cortez stated that he again "requested that he blow hard into the device, and at that point it seemed like it was even less of an effort. As if there was no real attempt." The defense twice objected to Cortez's opinion but the objections were both overruled.

The prosecutor commenced her direct examination of Sergeant Cortez with questions designed to qualify him as an expert on the administration of the PAS test.

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[9] The present 10-year period within which three prior DUI convictions can be used to elevate a fourth such offense to a felony was seven years at the time Forster was arrested. (See former § 23175.)

[10] *People v. Castro* (1985) 38 Cal.3d 301.

Cortez's answers established that he has been a member of the Fremont Police Department for 11 years and for two years before that with the Santa Cruz Police Department. He graduated from a five-month training program administered by the California Commission on Peace Officer Standards and Training (POST), which included training on the use of PAS devices, the law pertaining to the PAS test, and the use of different models of such devices. Cortez also described the detailed series of steps that had to be taken to insure the device is functioning properly and producing accurate readings of blood alcohol content if there is any.

There can be no doubt Cortez "has special knowledge, skill, experience, training, or education" (Evid. Code, § 720) sufficient to qualify him as an expert on the subject of administering the PAS test, and that he testified as such. Therefore, it was entirely proper for him to be examined by counsel as to his qualifications, the subject to which his expert testimony related, and the matter upon which his opinion was based and the reasons for his opinion. (Evid. Code, § 721.)

VI.

Overruling Appellant's Objections to the Admission of Evidence Appellant was on Misdemeanor Probation Requiring Him to Consent to Forensic Testing Was Not Arguably Erroneous

Appellant filed a pretrial motion to exclude evidence that he was on misdemeanor probation at the time he was detained, that a condition of probation compelled him to submit to forensic testing, and that violation of certain terms of his probation might provide evidence of consciousness of guilt.[11] Appellant argued that such evidence was more prejudicial than probative. (Evid. Code, § 352.)

[11] Appellant also objected to the prosecutor's intention to introduce evidence that a PAS test of the sort administered to appellant was within the scope of a forensic test that could properly be used consistent with the terms and conditions of appellant's probation, and the court correctly overruled the objection. The administration of a PAS test to appellant is statutorily authorized. (§ 23612, subd. (h).) Section 23154, subdivision (c)(1), provides that "A person who is on probation for a violation of Section 23152 or 23153 who drives a motor vehicle is deemed to have given his or her consent to a preliminary alcohol screening test . . . or other chemical test for the purpose of

Appellant's motion to exclude was overruled, and the court read to the jury a stipulation of the parties which stated as follows: "On September 11, 2014, the defendant was on misdemeanor probation, among other terms, [the conditions of his] probation included the following terms: Do not drive a motor vehicle with a measurable amount of alcohol or drugs in blood; and submit to a chemical test of blood, breath or urine on demand of any peace officer or probation officer; consume no alcoholic beverages." The court also told the jury that at the time he was placed on probation appellant "accepted all of the terms and conditions of probation." The jury was also informed that this evidence was admitted for a limited purpose. "If you believe the defendant violated a term of his probation, you may consider whether that shows consciousness of guilt. You may not consider that evidence regarding his probation for any other purpose."

The trial court properly overruled appellant's objection to the evidence provided by the stipulation regarding appellant being on probation at the time he was detained and the conditions thereof, because the prejudicial effect of the evidence was substantially outweighed by its probative value.

As we have said, prior misdemeanor convictions themselves are inadmissible to impeach credibility, however, "evidence of the underlying *conduct* may be admissible subject to the court's exercise of discretion." (*People v. Chatman* (2006) 38 Cal.4th 344, 373.) The threshold inquiry for admissibility of evidence pertaining to a prior misdemeanor conviction is whether the prior criminal conduct, or the consequences of the conviction, have some logical bearing on the veracity of the defendant or some other factor pertinent to his or her guilt or innocence. (*People v. Chavez* (2000) 84 Cal.App.4th 25.)

The evidence of appellant's misdemeanor priors was incidental to the evidence of the conditions of probation imposed in those cases to which appellant expressly agreed. The restrictions on drinking and driving, and the requirement that he submit to forensic

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determining the presence of alcohol in the person, if lawfully detained for an alleged violation of subdivision (a)." (Accord, *People v. Williams* (2002) 28 Cal.4th 408.)

testing of his blood-alcohol content that appellant had previously agreed to are probative of his consciousness of guilt of the present charges and the consequences of violating those conditions.

The probative value to show consciousness of guilt has been held to outweigh evidence at least as prejudicial as that at issue here. (See, e.g., *People v. Garcia* (2008) 168 Cal.App.4th 261 [In trial for aiding and abetting first degree murder, trial court acted within its discretion in finding that probative value of evidence showing consciousness of guilt outweighed any undue prejudice of evidence revealing that the defendant had been arrested after a stand-off with a police SWAT team, had told police he had a shotgun and wanted to come out of the house high on marijuana, and was wanted in two other shooting incidents, one of which resulted in the deaths of two persons]; see also, *People v. Rogers* (2009) 46 Cal.4th 1136.)

A trial court's decision to admit or exclude evidence under section 352, which requires a balancing of the probative value against prejudicial effect, is a matter committed to its discretion " ' "and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*People v. Geie*r (2007) 41 Cal.4th 555, 585.) Such a showing cannot arguably be made in this case.

VII.

The Admission of Appellant's Statements to Arresting Officers Did Not Arguably Violate the Mandate of Miranda v. Arizona (1966) 384 U.S. 436

Appellant received no *Miranda* warnings at any point during the police detention and investigation until, after completion of the blood draw, he was arrested. During a pretrial hearing on the parties in limine motions, the deputy district attorney represented that she did not intend to introduce into evidence any statements made by appellant after the blood draw, and the trial court precluded her from doing so "unless it would be for some rebuttal or something of that sort." As the court stated "[p]ost blood draw, no statements."

Acknowledging "pre-arrest statements during the course of an investigative detention are not subject to *Miranda*," defense counsel argued that "there's an analysis that needs to be conducted about the level of custody, the level of interrogation and things of that nature. And at this point I'm just asking the court to make sure we're in compliance with the Fifth Amendment." The trial court was aware appellant was not free to leave during the investigatory detention until an officer could determine whether there was probable cause to arrest, which in this case occurred after the blood draw, but that questioning could proceed without a *Miranda* warning. The problem the court discussed with counsel was that it appeared that no *Miranda* warning had ever been given, which was the basis upon which the public defender moved to dismiss the complaint. The motion was denied, but the court reserved the right to exclude postarrest statements reasonably objected to during the course of trial, as well as pre-arrest statements that had been videotaped by the police officers during their investigation.

We need not decide whether this ruling was erroneous because if it was the error would be harmless. The deputy district attorney did not introduce any statements at trial made by appellant after the blood draw, and the public defender never objected to evidence of any of appellant's statements on *Miranda* grounds.

DISPOSITION

For the foregoing reasons, and because our review of the record discloses no other arguable errors that might require reversal of the judgment, no additional briefing is required and the judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Stewart, J.

_____
Miller, J.

People v. Reynolds (A148131)